



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
|                                  | ) | ISCR Case No. 10-06184 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Eric Borgstrom, Esquire, Department Counsel  
For Applicant: *Pro se*

July 6, 2011

**Decision**

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LYNCH, Noreen A., Administrative Judge:

After a review of the pleadings, exhibits, and testimony, I have no questions or doubts as to Applicant’s eligibility and suitability for a security clearance, as he has mitigated the Government’s security concerns. Applicant’s eligibility for access to classified information is granted.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on January 22, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on November 30, 2010, detailing security concerns under Guideline E (Personal Conduct), and Guideline M (Use of Information Technology Systems), that provided the basis for its preliminary decision to deny him a security clearance. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant answered the SOR in writing on December 14, 2010, and requested a hearing before an administrative judge. I received the case assignment on February 11, 2011. DOHA issued a notice of hearing on March 4, 2011, and I convened the hearing as scheduled on May 4, 2011. The Government offered nine exhibits marked as GE 1 through 9, which were admitted into evidence without objection. Applicant testified, presented two witnesses, and submitted exhibits marked as AE A through E, which were admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on May 13, 2011.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 2.a, and 2.b of the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is 61 years old. He received his undergraduate degree in 1971. Applicant is married and has one adult son. He served as an industrial security specialist in a federal position from approximately 1980 until April 2009. He has held a security clearance since 1980. He resigned from federal service in April 2009 in lieu of termination. He is currently sponsored for a position by a defense contractor. (Tr. 27) His security clearance was suspended on January 6, 2009 because he misused a government laptop to view sexually explicit websites. (GE 9)

Applicant's wife has been disabled for the past 20 years. (Tr. 30) She suffers from a muscle and nerve disorder primarily in the region of her back. She has been diagnosed with Fibromyalgia and visits a rheumatologist, neurologist, and general practitioner. She requires physical therapy three days a week. (GE 7) Applicant has cared for her during the past 20 years.

Between 2004 and February 2008, she had a series of breathing attacks where the air to her lungs was cut off. These attacks often began with a simple cough, which then escalated to the point where she gasped for air. As a result of these attacks, she also suffers from anxiety and panic attacks fearing that the breathing problem will reoccur. In March of 2008, she was involved in a car accident, resulting in a shoulder injury which aggravated her pre-existing disability. (GE 7)

Until the fall of 2006, Applicant's son was a strong and healthy young man active in school activities and sports, including as a lineman on his school's football team. In the fall of 2006, he was diagnosed as having a pineal cyst at the base of his spine. He had his first surgery in October 2006. In order to treat the wound, he had follow-up visits with his physician three times a week. (Tr. 31) Applicant's son threatened suicide in front of Applicant. Applicant was in constant emotional pain.

In the summer of 2007, another tract infection was discovered requiring immediate surgery. For the next year and a half, Applicant's son received painful silver

nitrate treatments on a weekly or biweekly basis. During this period, Applicant's son could not engage in physical activity of any kind. The amount of time he could sit or walk was limited. In January 2008, Applicant's son was referred to a wound care specialist. In April 2008, Applicant's son developed another infection in his rectum which required another surgery. A third surgery occurred in July 2008. Applicant was responsible for part of the home care for the next four months.

Applicant acknowledged that from about September 2007 until October 2008, he viewed sexually explicit websites on his government issued laptop from his home. He estimates that it was three to four times a week to daily. He visited the websites during the workday and after work. He did not download any pornographic images or programs or save any images or links to his hard drive. (Tr. 41) He describes his use as a "long term isolated incident." (GE 6)

Applicant said that he was shown a website by another contractor at some point in 2007. He had the website emailed to him and started to visit other sites. At first he said the contractor sent him the email on his own, but at the hearing he acknowledged that he gave his email to the contractor so that the contractor could send the website. (Tr. 93)

Applicant recognized his use of the computer was unsanctioned and inappropriate. He is sorry for the pain and distress that his actions caused his family. He regrets making this serious mistake. He states that he betrayed the trust that had been placed in him. He takes responsibility for his actions and does not downplay his error in judgement. (AE C) Applicant notes that his productivity and ability to perform his duties did not suffer. His supervisor at the time confirms that Applicant's work performance was not adversely affected. (GE 7)

In July 2008, Applicant's lap top was confiscated by his supervisor. (GE 8) After an interview and investigation, Applicant was charged with misuse of his government computer due to viewing sexually explicit material. (GE 9) Applicant was issued another computer and told to return to work. (Tr. 36) At some point in 2008, he was put on administrative leave with pay. (Tr. 48)

Applicant appealed the decision to terminate him as too severe an action. He argued through counsel that he had 28 years of federal service with no prior disciplinary actions. However, he lost the appeal. Applicant resigned from his position in lieu of termination in April 2009. His SF 50 notes that the nature of the action is resignation. (GE 9) Applicant credibly stated that he was given an option to resign rather than be terminated. (Tr. 48) However, the SF notes in the remarks section that he resigned in April 2009 after a decision was made to separate for misuse of government information technology resources and failure to follow agency regulation and policy. (GE 9)

In January 2009, Applicant consulted a licensed clinical social worker for counseling. He saw him on a weekly basis. Applicant recognized that his emotional distress about his family may have contributed to this behavior, which was inconsistent with his true character. He also sought treatment for the stress and anxiety that

accompanied the termination from federal service. Applicant had weekly sessions with the LCSW until July 2009. (AE E) He was diagnosed with adjustment disorder with anxiety. Applicant learned how to cope with stressors. He knows this behavior was out of character for him. He had not been familiar with any websites on the Internet dealing with explicit sex before seeing one at a defense contractor's computer in another office. At first, he rationalized that he could access the sites because there were no warning signs on the computer screen and the sites were not blocked.

At the hearing, Applicant testified that he dealt with the stress of the conditions at home in an unhealthy manner. He stated that it was a distraction from daily problems and opened a world of fantasy and excitement. He did not have his own computer so he would use the government laptop. (Tr. 13) Applicant was credible when he testified that he worked after hours and on weekends to make up any lost time when he had accessed the websites.

At the hearing, Applicant expressed remorse for his misbehavior. He stated that the pain, grief, and devastation that he caused his family is tremendous and haunts him everyday. At the time he needed help with a life crisis, namely his wife and son's illness, and he dealt with his problems in an unhealthy way. He did not seek out clergy for guidance at the time. Instead, he looked to pornography for a quick fix. (Tr. 13) He noted the distraction eased the pain and opened a world of fantasy and excitement.

Applicant now has support from his family, his church, and his counselor. He is free to return for counseling at any time. Applicant uses the techniques he learned in counseling, such as sleep enhancement techniques and stress reduction techniques. He has learned to quiet his mind. (AE E) He has insight into his patterns, including the destructive one of visiting the sexually explicit websites. He knows how to control his responses. (Tr. 14) Applicant emphasized that he is peaceful, calm, and has eliminated stressors through meditation, exercise and phone calls to a counselor. He has no intention of visiting any such websites and has not since the summer of 2008. The horrific pain he caused his family is a strong deterrent for him.

Applicant submitted a packet of documents to include awards, letters of appreciation and commendations from 1984 until 2010. (AE B) They attest to the fact that Applicant went beyond expectations in every project. He brought credit to his team and to each contractor that he helped.

Applicant's supervisor until 2007 testified at the hearing. He has known Applicant for more than 25 years. (Tr. 101) He retired from federal service with a security clearance. He describes Applicant as an honest, trustworthy, dependable, reliable team player who is devoted to work and family. Applicant's supervisor evaluated him for many years. There was never a problem with his work. Applicant's supervisor noted that Applicant was always willing to receive constructive feedback and incorporate the ideas into his performance. (Tr. 103) Applicant's supervisor recommends him for a clearance and is confident that he will continue to render a high level of performance in the future despite the behavior. (AE D)

A defense contractor who has known Applicant for more than ten years, testified at the hearing that Applicant was very helpful to him in his work as an industrial security specialist. He describes Applicant as helpful, thoughtful, and professional. (Tr. 54) He knew about the personal difficulties that Applicant had with his family. He has recommended Applicant for various positions. (Tr. 62)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline M: Use of Information Technology Systems**

AG ¶ 39 expresses the security concern pertaining to use of information technology systems:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following: (e) unauthorized use of a government or other information technology system.

Applicant admits that he used a government computer with varying frequency to include daily, from about September 2007 to at least October 2008, to view sexually explicit websites. Applicant's actions are a violation of the policies and regulations regarding the misuse of government issued information technology equipment. The Government has established a *prima facie* case under Guideline M.

AG ¶ 41 provides conditions that could mitigate security concerns:

(a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available; and

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

Applicant's decision to view sexually explicit websites was out of character for him. He never violated any other policies during his 28 years of federal service. He has this one blemish on his record. Applicant displayed poor judgment in accessing the inappropriate sites on a government computer because his family situation was causing him emotional distress and turmoil. He admits his mistakes and does not downplay the seriousness of them. His last visited the pornographic websites in July 2008. He sought counseling in 2009, and learned techniques to deal with pressures and stressors. He accepts responsibility for his actions. He has insight into his behavior and a support system. His misconduct is unlikely to recur. It does not cast doubt on his current reliability. He has an excellent work performance history. His conduct is mitigated under AG ¶ 41(a).

### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the

person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

(f) violation of a written or recorded commitment made by the individual to the employee as a condition of employment.

Applicant violated the work policy by viewing sexually explicit websites on his government issued laptop for almost two years. He exercised poor judgment. The behavior is the same as alleged under misuse of technology. He was offered an opportunity to resign before termination. He decided to resign in April 2009. However, his SF 50 notes that he was subject to termination based on the behavior described above. AG ¶¶ 16(c), 16(d), and 16(e)(1) apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;



(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's conduct must be put in the appropriate context. He was under great emotional strain due to family illness. He does not deny that he exercised poor judgment for about 13 months. He knows that he engaged in unhealthy, destructive behavior. He has taken positive steps through counseling to alleviate the pattern of using sexually explicit websites to handle his stress. His behavior is one blemish on a 28-year career. He resigned in April 2009. His misuse of the government computer happened under unique circumstances. He lost his career and is motivated and able to perform his work in a healthy manner. The misconduct is not likely to recur and does not cast doubt on his reliability or trustworthiness under these circumstances. He is not subject to exploitation based on his behavior. He receives mitigation under AG ¶ 17(c),(d), and (e).

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has worked for the federal government, holding a security clearance for 28 years. He has an excellent work history and recommendations from his supervisor. He has received several awards and letters for his work. He is married and has one son. He has cared for his wife for at least 20 years. His son became seriously ill and needed care in 2006, 2007, and 2008. Applicant was under great emotional stress. He continued to work and was effective in his work.

In late 2006 or early 2007, Applicant began viewing sexually explicit websites on his government computer. He did this on an almost daily basis. He was sanctioned by his employer with the threat of termination. He resigned before a termination. He obtained counseling. He now has insight into his behavior. He accepts responsibility for the behavior. His supervisor for almost 20 years attests to Applicant's work ethic and personal conduct. Applicant has the ability and motivation to never repeat a pattern of behavior such as he did in 2007 until 2008. There is no bright line for rehabilitation. In this case, Applicant has learned from his serious mistakes and taken responsibility.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his misuse of information technology under Guideline M and his personal conduct under Guideline E.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

|                           |               |
|---------------------------|---------------|
| Paragraph 1, Guideline M: | FOR APPLICANT |
| Subparagraph 1.a:         | For Applicant |
| Subparagraph 1.b:         | For Applicant |

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a-2.b: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Noreen A. Lynch  
Administrative Judge